

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE NO. 02-487

Supreme Court Case
No.: SC03-1171

**RESPONDENT’S MOTION IN LIMINE
TO EXCLUDE EVIDENCE ON DUE PROCESS GROUNDS
AND SUPPORTING MEMORANDUM OF LAW**

The Honorable Gregory P. Holder (“Judge Holder” or “Respondent”), by counsel, files with the Hearing Panel of the Florida Judicial Qualifications Commission (“the Panel”) this Motion in Limine to Exclude Evidence on Due Process Grounds and Supporting Memorandum of Law (“Motion”).

On July 16, 2003, the Florida Judicial Qualifications Commission (the “JQC”) filed a Notice of Formal Charges (the “Charges”) commencing this proceeding to determine whether Respondent plagiarized an Air War College (“AWC”) paper and falsely stated that it was his original work. To support its allegations JQC relies on a copy of an AWC paper submitted by E. David Hoard in 1996 (the “Hoard paper”) (Exhibit 1), and two alleged copies of a paper that contains material from the Hoard paper and allegedly was submitted to the AWC by Respondent in 1998 (“purported Holder paper”) (Exhibit 2 & 3) (Exhibit “A” to the Charges). Pursuant to this Motion, Respondent seeks to exclude from evidence the alleged copies of the purported Holder paper.

I. BACKGROUND

A. Judge Holder Enrolls in the Air War College in 1997.

In August 1997, Respondent enrolled in the Air War College, a non-resident program that allows senior officers to complete professional military education. *See* Dep. of Judge Holder at 7, 8 (Nov. 5, 2003). (“Holder Dep”) After enrolling, Judge Holder contacted individuals who had previously taken the course to familiarize himself with its requirements, including a writing assignment. *See* Aff. of Vento ¶¶ 4-6 (“Vento Aff.”); Aff. of Morrow ¶¶ 11, 12; Holder Dep. at 12. Among the individuals whom Judge Holder contacted was E. David Hoard. *See id.* Mr. Hoard and others subsequently provided Judge Holder with AWC papers so that he could review their format, which had to be “strictly” followed. *See* Holder Dep. at 13-14; Vento Aff. ¶¶ 5, 6.

During November and December 1997, Respondent began researching and writing his AWC paper. *See* Aff. of Nasco, June 27, 2003, ¶ 3 (“Nasco Aff. I”); Holder Dep. at 17-18. He initially dictated and handwrote his AWC paper, and his assistant, Lorraine Nasco, typed the first draft. *See* Nasco Aff. I ¶¶ 4-5, 8-9; Holder Dep. at 26, 29-30. When Nasco finished the initial draft, the paper was well in excess of the page limit, necessitating significant editing by Judge Holder prior to the submission of his AWC paper. *See* Nasco Aff. I ¶¶ 8-9; Holder Dep. at 31. In early January, Ms. Nasco mailed the AWC paper, along with a copy on

disk, to Maxwell AFB. *See* Aff. of Lorraine Nasco, August 31, 2003, ¶ 10 (“Nasco Aff. II”); Holder Dep. At 17, 32; *see also* Howard Dep. at 38-39.

Shortly after submitting his paper, Judge Holder provided three individuals—James Russick,¹ Kenneth Lawson,² and John Vento³ (who was a good friend of Mr. Hoard⁴)—each with an ungraded copy of the paper Judge Holder submitted. *See* Aff. of Lt. Col. Russick ¶ 8 (“Russick Aff.”); Aff. of Lawson ¶¶ 6-7 (“Lawson Aff.”); Vento Aff. ¶ 7; Holder Dep. at 42-44. Respondent provided Mr. Lawson with a copy of the Hoard paper as well. *See* Holder Dep. at 43-44. *See also* Lawson Aff. ¶ 6-7.

In late January, Judge Holder received his AWC paper from the Air Force. *See* Dep. of Charles Howard. (“Howard Depo.”) Judge Holder placed his paper in an unlocked desk drawer in his hearing room along with other military paperwork, including the Hoard paper. *See* Holder Dep. at 15, 25. Periodically, Judge Holder

¹ Mr. Russick is a retired Lieutenant Colonel who attended the 1997-98 AWC seminar with Judge Holder. (Russick Aff. ¶¶ 2, 6.) He and Judge Holder did research regarding the AWC writing assignment together at MacDill AFB library in October 1997. (*Id.* ¶ 8.) Due to his mother’s failing health and subsequent death, Mr. Russick deferred writing his paper until spring of 1998. Judge Holder had provided him with a copy of Judge Holder’s AWC paper before AWC class shortly after the paper was filed with the Air Force.

² Mr. Lawson, who was then an Assistant United States Attorney, was contemplating enrolling in the AWC course. (Lawson Aff. ¶¶ 1, 6.)

³ Mr. Vento is an Air Force Reserve Colonel and well-respected Tampa attorney who completed the AWC prior to Judge Holder. (Vento Aff. ¶¶ 1, 3.)

⁴ Judge Holder was well aware that Mr. Vento is a good friend of Mr. Hoard. (Vento Aff. ¶ 7.) Mr. Vento does not believe that anyone who plagiarized a paper written by Mr. Hoard would send a copy to Mr. Vento, as it was very possible that he would also have a copy of Mr. Hoard’s paper. (*Id.*)

would open the drawer to obtain military paperwork and would see the AWC papers. *id.* at 25. Judge Holder does not recall seeing the AWC papers in this drawer after approximately 2001. *id.* at 25-26.

B. The Mysterious Appearance of the Purported Holder Paper

Beginning in 1999, Respondent reported to then Chief Judge Dennis Alvarez that certain judges, who later resigned, were engaging in improper conduct. *See* Aff. of Curry, Jr., ¶ 1. (“Curry Aff.”). In July 2000, Judge Holder’s bailiff, Sylvia Morgan, discovered former Judge Robert Bonanno in Respondent’s Chambers after hours. *See* Holder Dep. at 68; Curry Aff. ¶ 1. Judge Bonanno then left Respondent’s chambers carrying some documents. *See* Grand Jury testimony of Sylvia Gay (n/k/a Sylvia Morgan) at 55 (Oct. 11, 2000)⁵ Judge Holder reported this incident and an investigation was initiated. *See* Curry Aff. ¶ 1.

During 2001 and 2002, Judge Holder cooperated with an FBI investigation into court system corruption. *See* Dep. of Bartoszak at 11-21 (“Bartoszak Dep.”). The investigation’s targets had motive to seek retribution against Respondent. *See* Aff. of James W. Bartoszak ¶ 4. (“Bartoszak Aff.”). According to Assistant U.S. Attorney, Jeffrey Del Fuoco, in early 2002, in the midst of that investigation, an unmarked envelope was anonymously placed under his office door at the Army Reserve Headquarters in St. Petersburg. *See* Aff. of Jeffrey J. Del Fuoco (Mar. 10,

⁵ Transcript of Grand Jury Testimony of Sylvia Gay available in Supreme Court Case No. SC01-2078, Inquiry Concerning a Judge, No. 00-261, Re: Robert H. Bananno.

2003) (“Del Fuoco Aff.”). Del Fuoco claimed that the envelope contained a typewritten note to the effect that “I thought you would be interested in this or something should be done about this.” *id.* The note was purportedly signed “A concerned citizen” or “A concerned taxpayer.” *id.* Along with the note allegedly was a copy of the purported Holder paper and a copy of the Hoard paper. *See id.*

C. Investigation into the Purported Holder Paper.

For unexplained reasons, the United States Attorney’s Office waited until January 2003 to provide the AWC papers to the Air Force. *See id.* Equally inexplicably, Del Fuoco apparently has “lost” the envelope and accompanying note. *See* Letter from C. Pillans to Col. Jaster (Dec. 12, 2003). (Exhibit 4) Ultimately, in. As a result, the Air Force began investigating the same matters at issue in this proceeding: whether Respondent had plagiarized his AWC paper and made a false statement when he certified that it was his original work. *See* Letter from Col. McClain to Col. Leta (Jan. 29, 2003). (Exhibit 5)

Respondent contested these charges, relying in part upon the testimony of four eyewitnesses that the purported Holder paper was not the paper he submitted to the AWC in 1998. After considering this compelling evidence, Major General Fiscus, the Judge Advocate General of the Air Force, restored Respondent’s designation as a Judge Advocate. During the Air Force investigation, the JQC filed its Notice of Formal Charges.

D. The Lack of Evidence of the Authenticity of the Purported Holder Paper.

- 1. The only witnesses who recall reviewing Judge Holder's paper have sworn that the purported Holder paper is not the paper Judge Holder submitted to the AWC.**

After extensive investigation and discovery, the JQC has admitted that it **“has no witness who can testify based on personal knowledge that [the purported Holder paper] is an authentic copy of the actual paper that respondent submitted to the Air War College in January 1998.”** *See* Resp. to Resp.'s 1st Req. for Admissions ¶ 1, (emphasis added). In fact, the JQC does not have a single witness that can testify based upon personal knowledge to any of the following:

1. that the purported Holder paper “could not have been fabricated through the use of existing computer and/or other technology or techniques”;
2. that the purported Holder paper “could not have been written by someone other than the respondent,” Judge Holder; or
3. “that the purported Holder paper was actually received by the Air War College”.

Id. ¶¶ 16-19, 22-23, 36-41.

By contrast, Judge Holder and four independent witnesses have testified, and will testify, that the purported Holder paper is not the paper that Respondent submitted to the AWC in 1998. First, Respondent testified that he did not “recognize any part of this [purported Holder] paper as being [his] work.” *See* Holder Dep. at 20. Second, Mr. Russick, who read Respondent's AWC paper in

1998, reviewed the purported Holder paper and stated that “I can unequivocally state that I had never before read the alleged Holder AWC paper. The paper alleged to be Col. Holder’s is not the same one that I read in 1998.” *See* Russick Aff. ¶ 9. Third, John Vento will testify that he “reviewed the [purported Holder paper] and do not believe that the paper that I received from Judge Holder and read in 1998 was as sloppy and poorly written as the alleged Holder paper.... [I]f Judge Holder’s paper had been as bad as the alleged Holder paper that I have recently read, I would certainly have discussed this with him and did not, in fact, do so.” *See* Vento Aff. ¶ 9. Fourth, Ken Lawson, who reviewed Respondent’s and Hoard’s AWC papers in 1998, states that “[t]he papers did appear to be different papers and I did not notice any similarities.” *See* Lawson Aff. ¶ 7. Fifth, Ms. Nasco, who typed Respondent’s AWC paper, has stated unequivocally that “I have looked at the [purported Holder paper]... and do not recognize it as the one I typed for him.” *See* Nasco Aff. I ¶ 15.⁶

⁶ Moreover, Lt. Col. Howe, the grader of Respondent’s AWC paper, admitted that he cannot authenticate the purported Holder paper as having been submitted by Respondent. From June 1995 to March 1999, Lt. Col. Howe graded approximately 3000 papers, of which approximately 600 were on the exact same topic as the one on which Respondent wrote. *See* Howe Dep. at 26-28. Accordingly, Lt. Col. Howe testified that he “can’t distinguish Judge Holder’s paper from anybody else’s paper.” *id.* at 27. Lt. Col. Howe could identify the handwriting on the purported Holder paper as his own. *See id.* at 42. But, during his deposition, Lt. Col. Howe was presented with two copies of mock AWC papers manipulated by a printer, Walter Williams, to add to them comments in Lt. Col. Howe’s handwriting. *See id.* at 47. Lt. Col. Howe identified the handwriting on the manipulated papers as his own and, therefore, assumed that the papers had been submitted to him and that he had graded them. *See id.* at 47. This, of course, was not the case. According to Mr. Williams, who put Lt. Col. Howe’s handwriting on these two manufactured

1. The overwhelming circumstantial evidence shows that the purported Holder paper is not the paper Judge Holder submitted to the AWC.

The purported Holder paper is highly suspicious for a number of reasons. As set forth above, it both has unexplained origins and purports to have been prepared by a Judge who was a cooperating witness in investigations into public corruption. The paper also lacks the usual hallmarks of a paper submitted to the AWC. When the AWC receives a paper, it is stamped with a date stamp. The purported Holder paper, however, is missing that stamp. *See* Howard Dep. at 33. When Lt. Col. Howe grades the paper, his standard procedure was to write at the end of the paper concluding comments and the student's grade. *See* Howe Dep. at 16. However, the purported Holder paper lacks both, causing Lt. Col. Howe to conclude that the "purported Holder paper" is "unusual." *See* Howe Dep. at 43 (quoting Howe Aff.). Indeed, after completing the grading process, Lt. Col. Howe would forward the graded paper to the student with a signed typed letter giving formal remarks and the paper's grade. *See id.* at 16-17. Again, however, the purported Holder paper lacks such a letter.

2. The purported Holder paper is inconsistent with Judge Holder's writing style.

Those familiar with Judge Holder's writing style have described him as a "meticulous, veracious writer." Thus, the purported Holder paper "does not comport with his writing style." *See* Curry Aff. ¶ 2. In fact, Judge Holder testified that he does not "recognize anything in it as being [his] style of writing." *See* Holder Dep. at 21. Lastly, Ms. Nasco stated that the purported Holder paper was not "the quality which our office would produce or submit under any set of circumstances." *See* Nasco Aff. I ¶ 16.

3. Plagiarism is inconsistent with Judge Holder's character.

The JQC has not produced a single witness that has questioned Judge Holder's good character. He has been described as "honest, ethical and honorable" *See* Vento Aff. ¶ 2, a man who "exhibits only the highest standards of ethical conduct and professionalism" *See* Letter from K. Ambler to Gen. Fiscus, Aug. 27, 2003 ("Ambler Letter"), a man "with a strong work ethic unsurpassed by any officer that I know" *See* Russick Aff. ¶ 12, and a man of "the highest moral values,

papers, "it's real simple to manipulate a paper And so we showed [Lt. Col. Howe] just how easy it would be to manipulate a paper." *See* Dep. of Walter Williams at 9 ("Williams Dep.").

a dedicated and devoutly religious man, a jurist of unquestioned credibility and unassailable integrity and an officer of the highest possible standards of behavior” *See* Aff. of John S. Odom, Jr., ¶ 8 (“Odom Aff.”). In fact, those who know Judge Holder have unequivocally stated that plagiarism is “absolutely inconsistent with the character of Judge Holder” *See* Aff. of Patricia Fields Anderson ¶ 16, “inconceivable” *See* Ambler Letter ¶ 3, and not believable *See* Odom Aff. ¶ 10.

II. THE ADMISSION OF THE PURPORTED HOLDER PAPER VIOLATES FEDERAL AND FLORIDA DUE PROCESS.

A JQC hearing must satisfy procedural and substantive due process requirements. *See In re Inquiry Concerning a Judge*, 357 So. 2d 172, 181 (Fla. 1978). As Respondent has explained in other motions, the purported Holder paper is not admissible under the Florida Evidence Code. Additionally, admission of the purported Holder paper would violate Respondent’s federal and Florida due process rights.

Courts have repeatedly recognized “the general principle that state evidence rules must, in some instances, yield to greater principles established by the Constitution.” *Curtis v. State*, 876 So. 2d 13, 19 (Fla. 1st DCA 2004). Thus, due process may require the exclusion of otherwise admissible evidence. *See McLean v. State*, 854 So. 2d 796, 803 (Fla. 2d DCA 2003) (recognizing that admission of evidence authorized by Evidence Code may sometimes violate due process. *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993) (holding that evidence violates due process where it is irrelevant and renders the “trial fundamentally unfair”); *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (reversing judgment as violative of due process). Here, for all the reasons set forth above, federal and Florida due process requires the exclusion of the purported Holder paper.

Dated: August 25, 2004

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CERTIFICATE OF SERVICE

I certify that on August 25, 2004, a copy of the foregoing has been served by U.S. Mail to Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; and by telecopier and U.S. Mail to: Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.

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